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No._____

IN THE

Supreme Court of the United States

October Term, 1984

COCHRANE & BRESNAHAN,
PAN O'GOLD, INC., IMPERIAL PRODUCTS CORP.,
and JOHN E. KOERNER & CO., INC.,

Petitioners,

v.

PLAINTIFF CLASS REPRESENTATIVES and
THE PLAINTIFF CLASS,

Respondents.

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION (MDL 414)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Opposition by class counsel to a proposed class settlement should never form the sole basis for disqualification even when one client/class representative chooses to accept a class settlement whereas another chooses to oppose the settlement. Should the private interest of one class representative form the basis of disqualification of class counsel seeking to oppose a class settlement, when the motion for disqualification is filed solely by proponents of the settlement, not the client, the motion is filed and heard in an appellate court in the absence of an evidentiary hearing, and an untainted decision on the merits of the settlement could have been rendered prior to or have mooted consideration of such a motion?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Cochrane & Bresnahan, Pan O'Gold, Inc., Imperial Products Corp., and John E. Koerner & Co., Inc., respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on November 15, 1984.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals disqualifying Cochrane & Bresnahan appears in Appendix A to this Petition, and is reported at 748 F.2d 157. The Order of the Court of Appeals denying a Petition for Rehearing en banc appears in Appendix B.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals was entered on November 15, 1984. A timely petition for rehearing and rehearing en banc was denied on January 3, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GOVERNING RULES AND STANDARDS INVOLVED IN THE CASE

The Federal Rule of Appellate Procedure involved is Rule 46(c) [Exhibit C]. This case also involves ABA Model Rule of Professional Conduct 1.9 [Exhibit D].

STATEMENT OF THE CASE

This case involves the right of a class representative to object to a class settlement without risking or causing disqualification of its counsel. Also involved is the interest of absent class members and objectors in maintaining knowledgeable counsel able to focus on the improprieties and inadequacies of proposed class settlements.

The decision below nullifies these rights by permitting proponents of a settlement to bring a successful disqualification motion in a court of appeal, without an evidentiary hearing, on grounds raised in the district court and on the basis

of fictional harm to an uncomplaining jointly represented client in which the only claimed basis for disqualification is that one formerly jointly represented client desired to accept the settlement whereas counsel and the other class representative believed opposition and objection to be appropriate.

Because it is desirable and economical for class representatives to be jointly represented and for class attorneys to work together, the decision of the Court of Appeals threatens to disrupt all future class settlements by preventing effective objection by class counsel.

The limited facts available to the Court of Appeals can be summarized briefly.

On December 21, 1979, Cochrane & Bresnahan, attorneys at law, ("C&B") were retained by Pan-O-Gold, Inc. ("Pan-O-Gold") to file an antitrust complaint against the major producers of corn derivative products. This action, No. 3-79-638 on the docket of the District of Minnesota, was commenced on December 26, 1979. [Response of C&B "R" at ¶ 1] Six weeks later, C&B was retained to represent the interests of Land O'Lakes, Inc. by the firm of Doherty, Rumble & Butler, P.A. ["DR&B"] and Eugene Warlich [Warlich] a member of that firm. In accordance with that authorization, a separate suit was filed on February 4, 1980 [R ¶ 2]. The following month, C&B began representation of General Mills under identical circumstances [R ¶ 3]. Prior to the initiation of representation of Land O'Lakes and General Mills, C&B had furnished DR&B with copies of previously filed pleadings in the various Corn Derivative Product litigation cases ("CDL"), including the government complaints and the Pan-O-Gold suit [R ¶ 4].

As of the date of the suit, C&B had discussed the CDL cases only with Warlich of DR&B, the attorney for Land O'Lakes and General Mills. The only information which has ever been received from Land O'Lakes and General Mills is purchase

data necessary to support their class claim. Even this information was received from DR&B. [R at page 4.] This same type of information was filed by many class members in response to the class notice and was provided by John E. Koerner & Co., Inc. and Imperial Products, objectors, as a result of a request from the proponents of the settlement made at the first fairness hearing of June 30, 1983.

By letter of February 1, 1980, also sent to C&B, DR&B explained the representation of DR&B and C&B to Land O'Lakes and confirmed the ten percent contingent fee in addition to the fee to be awarded by the court and the agreement as to how such fee was to be divided between C&B and DR&B. On February 5, 1980, John Cochrane of C&B wrote to Warlich of DR&B Re: "Corn Derivative Antitrust Litigation," then MDL 414, stating:

> Thank you for your letter of February 1, 1980. In following with our understanding, your firm will handle all of Land O'Lakes Interrogatories, document discovery matters, etc. and our firm will handle court appearances and court related matters regarding this litigation.

There has never been direct contact by C&B with the client, Land O'Lakes, concerning this case.

On July 3, 1980, Cochrane was appointed a member of the Steering Committee established by Pretrial Order No. 1. Warlich was not. [D20, A77.] The appointment of the steering committee was "subject to the right of any plaintiff to present any individual or divergent positions or to take individual actions, . . ." [A70-71.]

On April 6, 1983, C&B filed "Motion to Reject Proffered Settlements" [D235, A420] on behalf of Land O'Lakes and Pan-O-Gold. In the transcript of the 4/12/83 hearing, C&B,

who argued in favor of the motion, is noted as appearing as attorneys for General Mills. No appearance is noted for DR&B. The motion was denied by the Court on 4/21/83 [D240, A475, 477].

After notice of settlement had been sent, DR&B, as "Attorneys for Land O'Lakes, Inc." joined with Josef D. Cooper and other attorneys for various class members, including Safeway Stores, Incorporated and Quaker Oats, to file "Entry of Appearance of Counsel for Certain Class Members" [D750, A543-545]. Filed therewith were motions concerning discovery, to continue the hearing, and to extend the time for exclusion [D751, A546], together with supporting interrogatories, affidavits, and authorities. A hearing was held on June 30, 1980 at which time objectors, John E. Koerner & Co., Inc. and Imperial Products Corp. also made an appearance.

At this hearing, DR&B appeared, separately representing Land O'Lakes, and withdrew its "support for discovery." [A619.] In that hearing, Guido Saveri, one of the members of the plaintiffs' steering committee and one of respondents, Plaintiff Class Representatives and the Plaintiff Class, raised the issue of the prior representation by Cooper of United A.G. Grocers and his former membership in the plaintiffs' steering committee, and noted that the former client, now represented by other counsel, was in favor and actually "sponsored the settlement." [A624.] Mr. Cooper stated that his was one of three law firms representing United A.G. Grocers, and that "When the case was sent back here to Newark, I ceased being involved in the matter, . . ." In response to an inquiry of the court [A625], Cooper stated that he was unaware of what his previous client was doing or its support of the settlement.

THE COURT: Is this a problem in your mind?

MR. COOPER: I don't know, your Honor.

MR. SAVERI: They are supporting.

THE COURT: Let's get to the merits of the discovery motion rather than to the role of the various advocates, Mr. Berger. [A625]

Later in the hearing, Mr. Kohn, citing an unidentified ruling in the "Plumbing" case, contended that "counsel cannot represent people who stay in and people who opt out or people who oppose the settlement. It is inconsistent to take a dual position." According to Mr. Kohn, "You cannot develop a conflict where one of your clients is going ahead with the settlement and another client is opting out." [A634-35.]

In that hearing, C&B appeared against the settlement only for Pan-O-Gold [A656-660]. Mr. Berger attempted to suppress dissent and C&B's status as an objector, not by asserting any alleged conflict, but by stating that "Mr. Cochrane is estopped from making his objection," citing an affidavit which C&B had filed with its fee application [A660]. The court brushed this aside with the comment "Well, maybe he is anticipating something we don't know about yet." [A660].

At the August 17, 1983 hearing, after the court's opinion, C&B reiterated its objection [A824] on behalf of Pan-O-Gold [A831]. C&B affirmed its prior representation of Land O'Lakes and General Mills and stated: ". . . they have not decided to object to the settlement, your Honor." Mr. Kohn then raised the disqualification issue:

MR. KOHN: Couldn't your Honor, just as a technical matter, in view of what Mr. Cochrane has just said, Judge Harvey in the Plumbing case ruled, and I think he had since been followed by most judges, that counsel have a conflict of interest when they purport to oppose the settlement for one client and approve and represent another client which will participate in that settlement.

THE COURT: I think that was the reason I thought you had abandoned the objection, because I, at the last hearing in which you were not present, I think you were in China—

MR. COCHRANE: No, Greece, your Honor.

But let me address that. I am well aware of Judge Harvey, because I got a writ of mandamus on Judge Harvey to force a hearing on the settlements in the Plumbing cases. Mr. Kohn knows that. I'm well aware of what Judge Harvey said.

What I wish pointed out to the Court, those clients are represented by other counsel. I was just litigation counsel. So there is no conflict. They are perfectly well represented.

THE COURT: *I'm not going to get into that issue at this juncture.* All I want to do now is reflect that there is an additional objector. [A831-32, emphasis added.]

Later in the hearing, Judge Debevoise stated as to the value of the objections made in the case [A834-35]:

THE COURT: You made us look at questions which we may not otherwise have looked at. . . That's part of the process. I'm uncomfortable when nobody is opposing something. I had a habeas corpus question which nobody opposed. It made me very nervous.

The court's opinion noted that "two of the law firms which have reviewed the documents did not file objections to the settlement." [A843.] Perhaps as a result of the threat of disqualification, Mr. Cooper's firm did not file an objection. Stokeley-Van Camp, then being acquired by Quaker Oats, also did not file an objection.

On 10/4/83 notice of appeal was filed by Pan-O-Gold, John E. Koerner & Co., Inc., and Imperial Products Corp. [A875.]

No further or formal action was taken in the district court concerning disqualification, although at least one defendant [i.e. Corn Sweeteners] had not settled. Also a hearing was held on December 27, 1983 on the application of Mr. Koerner for attorney's fees [D881]. At that time, Mr. Koerner stated: "I'm in the anomalous position if I'm successful on the appeal, I do not get any fees except maybe one day." [p. 2]

> THE COURT: I would expect you to take over the whole litigation and you would get enormous fees at your successful conclusion of the litigation.

In response to the opposition of the proponents of the settlement to the fee application that the objector should get no fees, the court disagreed [pp. 8-9], and stated:

> THE COURT: I would have been uncomfortable granting the request without having someone come in and oppose it and make everybody face these changes in position [by the proponents of the settlement from violent opposition]. So in that sense, at least I had advocates on both sides and the issue was raised and debated and I could make a decision. Whereas if nobody had done it, I would have been looking, perhaps, to somebody to come and try to test why this change in position. So he was contributing in that sense, and I would have been more willing to approve the settlement. That may not have been his intent, but that was the effect. [pp. 9-10.]

On November 23, 1983, respondents, calling themselves "Appellees," moved in the Third Circuit "to disqualify counsel for the appellants, Cochrane & Bresnahan, *from prosecuting this appeal*, because of a manifest conflict of interest."

While the name of DR&B is endorsed on the signature page, no representative of DR&B signed the motion, and the moving parties note themselves solely as "Attorneys for Appellees, Plaintiff Class Representatives, and the Plaintiff Class." Neither Land O'Lakes nor General Mills filed the motion nor is alleged to support the motion. No affidavits were filed by movers. The unsupported statement is made that "Land O'Lakes affirmatively supports the settlements and is one of the appellees against which Cochrane & Bresnahan is now appealing." [Memorandum at 2.]

C&B stated that prior to its withdrawal of October 18, 1983, it was "never advised" by DR&B that "it was ever in a conflict position in this litigation . . ." [R at p. 5, Affidavit of John A. Cochrane at ¶ 6] This was after the filing of the notice of appeal. [Affidavit at ¶ 6.] At that time, Warlich stated to Cochrane: "I don't think you have a conflict."

In their various memoranda in support of disqualification, "Appellees" made conflicting factual representations, stating first that "In the course of its representation of Land O'Lakes, Cochrane & Bresnahan not only 'had access to' but actually received client confidences." [Mem. at 5] In their reply brief, this statement is watered down to an averment that C&B may have received such confidences. C&B unequivocally states that "no confidential information was had from Land O'Lakes or from General Mills" by C&B. [R at pp. 3, 4.]

On November 23, 1983, the motion to disqualify was filed in the Third Circuit. The response of C&B was served on December 8, 1983, with a reply from respondents shortly after. On December 21, 1983, Judges Gibbons, Hunter, and Garth stated: "The foregoing motion is referred to the panel to which the merits of the appeal is referred."

Disposition on the merits was listed for June 12, 1984, but "argument" was directed to be "soley [sic] on the Motion to

Disqualify." At the hearing, Clive Cummis, liaison counsel for the proponents of the settlement, argued and admitted in argument that the client had not filed the motion. DR&B was not present. Messrs. Koerner and Cochrane appeared and argued for C&B.

The decision of the Third Circuit of November 15, 1984 stated: "The motion to disqualify Cochrane & Bresnahan as counsel to Pan-O-Gold before this court will be granted." [O-14.] However, that decision cryptically states at note 3. "The status of Mr. Cochrane as a member of the steering committee is not questioned before this court." Mr. Cochrane's status before the district court was not adverted to, nor was he prohibited from acting on behalf of other appellants, John E. Koerner & Co., Inc. and Imperial Products Corp. No decision on the merits has yet been rendered, although the matter has been fully briefed by Petitioners and is otherwise ripe for decision.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE JUDICIAL REQUIREMENT THAT DISQUALIFICATION MOTIONS REQUIRE AN EVIDENTIARY HEARING AND A FULL FACTUAL RECORD, INCLUDING DECISIONS OF THE SECOND, FIFTH, SIXTH, EIGHTH, AND TENTH CIRCUITS.

Although the matter of disqualification was first raised in the district court, the motion was filed in the Third Circuit under circumstances where a resolution of "highly technical" questions was reached on "disturbingly elusive facts." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1222 (5th Cir. 1978), *cert. den.*, 439 U.S. 1115 (1979). The decision of the Third Circuit improperly states that "The parties tacitly

agree that this court should decide this motion on the present record. The pertinent facts are not in dispute." [O-7.] Both the majority and the concurrence erroneously attempted to excuse the failure to remand under the misapprehension that the disqualification motion was not raised in the district court. [O-8, 21.]

The importance of the issues to the client, the objectors, and to the absent class dictated that there be an evidentiary hearing, as was requested in oral argument, in which the factual ambiguities and uncertain factual and legal positions of the parties might have been fully explored. *Compare Pettway* at 1183, 1215. At oral argument, counsel for C&B cited cases supporting the position that remand for an evidentiary hearing was not only appropriate but was a matter of due process. *Melamed v. ITT Continental Baking Co.*, 534 F.2d 82, 84 (6th Cir. 1976) and *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. den.*, 436 U.S. 905 (1978), conflicting decisions from other circuits, were provided to the Third Circuit by letter dated 6/18/84.

Other conflicting decisions include *Hovsons, Inc. v. Secretary of Interior of the United States*, 711 F.2d 1208 (3d Cir. 1983), dissent of Judge Garth at 1226; *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 723 (7th Cir. 1982); *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F.2d 751, 760 (2d Cir. 1975); *J.P. Foley & Co., Inc. v. Vanderbilt*, 523 F.2d 1357, 1359 (2d Cir. 1975); *Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975). *Compare Pettway*, 576 F.2d at 1216.

Lacking an evidentiary record, the court below was forced to reach a number of factual conclusions adverse to C&B, based on fictional presumptions belied by the scant record and contrary to representations of C&B. *Pettway*, 576 F.2d at 1169, 1183.

C&B contended at the hearing that Land O'Lakes consented to the continued representation of Pan-O-Gold, a matter not adverted to in the moving papers of the respondents, and first raised at oral argument. This would have cured any alleged problem. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 89 (5th Cir. 1976). Since DR&B chose not to be present, despite notice, the court below improperly utilized a presumption of non-consent to overcome a direct factual representation of a distinguished member of its bar made in oral argument that was and remains unrebutted. *Silver Chrysler*, 518 F.2d at 759. Certainly such "luke-warm" [at best] pressing of the motion should have been taken note of, *Hovsons*, 711 F.2d at 1213. The failure of Land O'Lakes to bring such a motion is similarly evidence of consent and waiver. *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87-88 (9th Cir. 1983). *Black v. State of Missouri*, 492 F.Supp. 848, 862 (W.D. Mo. 1980).

Moreover, a retainer by an additional party of previously-engaged counsel in a complex multi-district class litigation, the new client represented by its own counsel should be presumed to understand that a later decision by the first client to accept or reject a settlement proffered at a later date does not give rise to a conflict of interest reachable by 4, 5, and 9 of the Canons of Ethics. *Allegaert v. Perot*, 565 F.2d 246, 250-51 (2d Cir. 1977). This is particularly true when the initial pre-trial order properly preserves the right to object, the additional client first consents to opposition to the settlement by the attorney and then changes sides, *Trinity Ambulance Service v. G & L Ambulance Services*, 1984-1 Trade Cases (CCH) ¶ 65,945 at 68,090-94 (D. Conn. 1984), or where there has been realignment during the case. *Black*, 492 F.Supp. at 862, et seq. *Compare* Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1191 (1981) and *Garner v. Wolfinbarger*,

430 F.2d 1093 (5th Cir. 1970), *cert. den.*, 401 U.S. 974 (1971) as discussed in Note, The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation, 97 Harv. L. Rev. 947, 956 (1984).

2. THE DECISION BELOW CONFLICTS WITH PRIOR RESTRICTION OF STANDING TO CLIENTS OR FORMER CLIENTS TO ASSERT DISQUALIFICATION ON GROUNDS WHICH MAY BE WAIVED, INCLUDING DECISIONS OF THE FIFTH AND SIXTH CIRCUITS.

The proponents were granted standing previously properly limited to the other or former client. *Yarn Processing,* 530 F.2d at 89-90; *Melamed v. ITT Continental Baking Co.,* 590 F.2d 290 (6th Cir. 1979); *Black,* 482 F.Supp. at 865-66.

While certain courts have expanded standing to assert disqualification to other than the injured client, the rationale for that extension, protection of the integrity of the court system, is not only absent from this case but is disserved if a capable and persuasive advocate of the rights of absentee class members is eliminated because he has taken the position that the settlement is unfair and its approval was inappropriate. *Yarn Processing,* 530 F.2d at 89-90. The opportunity for extorted consent and unprofitable contentiousness has been multiplied exponentially by the decision below, all to the detriment of the conscientious attorney who may feel duty bound to oppose a railroaded settlement. The potential mischief of such a rule, if permitted to stand, is demonstrated in that the two most knowledgeable of the four opponents of the settlement, Messrs. Cooper and Cochrane, were thereby eliminated. The case cited by the Third Circuit, *Kevlik v. Goldstein,* 724 F.2d 844, 848, 850-851 (1st Cir. 1984), suggests an awareness of the harm resulting from an indiscriminate grant of standing to urge "tactical disqualification."

3. DISQUALIFICATION SHOULD NOT BE PERMITTED TO BE USED AS A TOOL TO THWART OBJECTION TO CLASS SETTLEMENTS.

Disqualification is particularly inappropriate where no findings have been made as to the effect of unrebutted evidence that no confidences of Land O'Lakes have been provided to C&B, whose representation of Land O'Lakes was solely to make courtroom appearances. Rather the decision below concludes that it would be "unfair to permit C&B to use against its former client the information about the strengths and weakness of the case gained from joint representation." [O-13.] In the absence of a remand or an adequate evidentiary hearing, this was error. *Freeman*, 689 F.2d at 723. [Refusal to disqualify a co-counsel, if the attorney was not privy to confidential information]; *National Souvenir Center, Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 506 (D.C. Cir. 1984); *Gas-A-Tron of Arizona v. Union Oil Co. of California*, 534 F.2d 1322, 1325 (9th Cir. 1976).

In *Hovsons*, 711 F.2d at 1212, a violation by the attorney sought to be disqualified of both Canons 5 and 9 was assumed, yet disqualification was not found to be appropriate, "even assuming that the Code has been violated." This was, in part, because there was no prejudice to the client from the alleged conflict. *Hovsons*, 711 F.2d at 1213. *Silver Chrysler*, 518 F.2d at 757; *Grant*, 531 F.2d at 677.

No attempt in the present case was made to determine whether there "may" be prejudice to the client, because the client did not bring the motion and its counsel was not present at oral argument. Moreover, as is discussed *infra*, there can be no prejudice to the client by the appeal, whether successful or not. Moreover, in the absence of a remand, the freezing of the record through appeal would prevent the use of even hypo-

thetical information. Alternatively, the future use of any such fictional information could be prohibited, permitting C&B to retain their status as persuasive opponents of the unfair and defective settlement.

Accordingly, neither the public interest nor any private interest of the former clients is served by disqualification of C&B. Instead disqualification will have again been used successfully as a tool to suppress dissent and silence objection, *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 339 (1981), an inappropriate result since dissent in class actions is an important element in determining fairness. 97 Harv. L. Rev. at 955; *Pettway,* 576 F.2d at 1215. Compare the discussions of disqualification as a litigating strategy in *W.T. Grant v. Haines,* 531 F.2d 671, 677-78 (2d Cir. 1976); *Kramer v. Scientific Control Corp.,* 534 F.2d 1085, 1090 (3d Cir. 1976), *cert. den.,* 429 U.S. 830 (1976); *Black,* 492 F. Supp. at 862.

4. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION CONCERNING THE EXTENT TO WHICH PUBLIC INTEREST IN ADEQUATE REPRESENTATION OF ABSENT CLASS MEMBERS SHOULD BE SUBORDINATED TO PRIVATE INTERESTS OF CLIENT/CLASS REPRESENTATIVES WHO TARDILY WISH TO ACCEPT A CONTROVERSIAL SETTLEMENT.

The decision below improperly fails to take into consideration the interests of the class in a continuation of representation of their interests by Pan-O-Gold, a representative plaintiff, and by John Cochrane, an attorney appointed by the district court to act on behalf of the class.

The statement twice made that "On this appeal, C&B does not purport to represent anyone other than Pan-O-Gold" [O-8, O-12] ignores the interests of absentee and unrepresented class

members not to let the class settlement be unreviewed simply because the proponents of the settlement and some class representatives have chosen otherwise. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1121-23 (7th Cir. 1979); *Pettway*, 576 F.2d at 1176-78. *Compare* Rhode at 1203, 1204, 1215, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, at 1578, 1592 (1976); 94 Harv. L. Rev. at 1451, 1453, 1455; 97 Harv. L. Rev. at 947, 955, 959, and 960.

The factual situation of the present case is a corollary to the general principle that as to settlements, the duty of loyalty does not prohibit class counsel from treating named plaintiffs in a fashion inconsistent with their roles as clients, Developments, Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1247, 1446, 1447, 1449 (1981), particularly as here, when the client allegedly wishes the attorney to act in a manner inconsistent with what C&B sees as the best interest of both its clients [*id.* at 1454] that an appeal be taken. *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1971); *Pettway*, 576 F.2d 1177-78, 1216. *Compare Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir. 1983), cited by respondents on the merits and reaching an opposite result.

5. CONSIDERATION OF DISQUALIFICATION SHOULD HAVE AWAITED A DECISION ON THE MERITS UNAFFECTED BY ANY ALLEGED CONFLICT.

The timing of the disqualification ordered by the Court below may imply a bias in favor of a controversial settlement asserted to be unfair by a member of the Plaintiff's Steering Committee, now sought to be disqualified in retaliation for his objection. The issue of the validity, vel non, of the settlement is and has been ripe for disposition by the court below. The briefs and appendices have been filed; the date for argument

has passed; the parties await a decision. Why then, since nothing more can be done by C&B, must important questions of law and fact be resolved in a summary and ad hoc manner?

Should the judgment approving the settlement be affirmed, further dissent from C&B will not be possible, removing any conflict or the chance of using non-existent confidences. If the settlement is vacated or the case remanded for additional discovery as originally advocated by DR&B on behalf of Land O'Lakes, then C&B would have acted properly, as was DR&B's initial impulse and in contrast to the actions of the proponents of the settlement. *Mendoza v. United States,* 623 F.2d 1338, 1344, 1344, 1346-47 (9th Cir. 1980), *cert. den. sub nom., Sanchez v. Tucson Unified School Dist. No. 1,* 450 U.S. 912 (1981). This would also heal any conflict, since Land O'Lakes would presumably reassess its position or would enter into a separate settlement with the defendants. *In re Eastern Sugar Antitrust Litigation,* 697 F.2d 524, 530 (3d Cir. 1982).

Adding to the confusing and unsatisfactory nature of the order of the court below is that Mr. Cochrane's status as a member of the steering committee has not been questioned. Moreover, Mr. Cochrane's status before the district court was not adverted to, nor was he prohibited from acting as an independent class attorney or on behalf of respondents and objectors other than Pan-O-Gold.

Regardless, therefore, of the outcome of the motion to disqualify, C&B can and should be permitted to act independently to prosecute this appeal for the absent class members, Rhode at 1186, 1203, *Deposit Guaranty,* 445 U.S. at 340, 342, n.3. *Norman Norell, Inc. v. Federated Department Stores, Inc.,* 1978 Trade Cases (CCH) ¶ 62,037 at 74,741-42 (S.D. N.Y. 1978).

Finally, some weight should have been given to the choice of Pan-O-Gold of C&B as its counsel, *Trinity,* 1984-1 Trade

Cases ¶ 65,945 at 68,091-92; *Foley*, 523 F.2d at 1359; *Kramer*, 534 F.2d at 1094 (Rosenn, concurring) since the alleged conflict was the result of a decision of Land O'Lakes.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No.

COCHRANE & BRESNAHAN,
PAN O'GOLD, INC., IMPERIAL PRODUCTS CORP.,
AND JOHN E. KOERNER & CO., INC.,
Petitioners,

v.

PLAINTIFF CLASS REPRESENTATIVES AND
THE PLAINTIFF CLASS,
Respondents.

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION
(MDL 414)

APPENDICES TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5729

IN RE: CORN DERIVATIVES
ANTITRUST LITIGATION
(MDL 414)

John E. Koerner & Co., Inc.,
Imperial Products Corporation, and
Pan-O-Gold, Inc.,

Appellants.

Appeal from the United States
District Court for the
District of New Jersey
(D.C. Misc. No. 80-0059)

Argued: June 12, 1984
Before: SEITZ and ADAMS, *Circuit Judges*,
and LATCHUM, *Senior District Judge**
(Opinion Filed: November 15, 1984)

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* The Honorable James L. Latchum, Senior United States District Judge for the District of Delaware, sitting by designation.

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I.

A group of attorneys representing certain members of the plaintiff class,[1] who are consumers of corn derivative products, move for the disqualification of Cochrane & Bresnahan as attorneys for the appellant Pan-O-Gold Baking Company. This motion was made during the pendency of this appeal challenging an order of the district court approving the settlement of the class action.

II. FACTS

The parties tacitly agree that this court should decide this motion on the present record. The pertinent facts are not in dispute. The St. Paul, Minnesota, law firm of Cochrane & Bresnahan ("C&B") was privately retained by the Pan-O-Gold Baking Company, Inc. ("Pan-O-Gold") and Land O'Lakes, Inc. ("Land O'Lakes") to file separate antitrust complaints against the major producers of corn derivative products. Several other actions were brought throughout the country, and all the actions were consolidated by the Multidistrict Litigation Panel into the present action in the district court in New Jersey. C&B continued to represent both Pan-O-Gold and Land O'Lakes, who were named plaintiffs, as well as a plaintiff class member, General Mills, in this litigation.

After consolidation, a partner of C&B, John Cochrane, was named by the district court to be a member of the plaintiffs' steering committee, the group of attorneys that guided the litigation of this matter.

Before this action reached trial, a settlement was negotiated. Prior to the hearing by the district court on the fairness

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[1] The attorneys purport to speak for the plaintiff class. In view of our resolution of the standing issue, it is unnecessary to decide whether these attorneys in fact speak for the whole class.

of the settlement, John Cochrane filed a written objection to the settlement on behalf of Pan-O-Gold and Land O'Lakes. Later, on July 30, 1983, Cochrane was informed by an attorney for Land O'Lakes and General Mills that those companies had decided to accept the settlement if it were approved by the district court.

On September 7, 1983, the district court approved the settlement. On October 4, 1983, John E. Koerner & Company, Imperial Products Corporation and Pan-O-Gold, filed a notice of appeal. C&B mailed to the district court a notice of withdrawal as counsel of record for Land O'Lakes on October 18, 1983.[2] On this appeal, C&B does not purport to represent anyone other than Pan-O-Gold.

The movants then filed this motion to disqualify C&B as attorneys for Pan-O-Gold before this court on the ground that C&B's continued representation of Pan-O-Gold would violate the controlling standards of professional conduct.[3]

III. DISCUSSION

A. A DISQUALIFICATION MOTION BEFORE THE COURT OF APPEALS.

This disqualification issue was not raised in the district court. We believe, however, that this motion is properly before us. One of the inherent powers of any federal court is the admission and discipline of attorneys practicing before it. *See Matter of Abrams*, 521 F.2d 1094, 1099 (3d Cir.), *cert. den.*, 423 U.S. 1038 (1975) (each court may create independent standards and rules for the admission and discipline of attorneys before it); *Ramos Colon v. United States Attorney*, 576 F.2d 1, 3 (1st Cir. 1978). *See also* Fed. R. App. P. 46(c) (granting courts of appeals broad powers to discipline attorneys).

---

[2] C&B states that it also withdrew as counsel to General Mills.

[3] The status of Mr. Cochrane as a member of the steering committee is not questioned before this court.

To resolve this motion, we must determine the governing standard for professional conduct before this court. Our court of appeals has never formally adopted any particular formulation of the standards of professional conduct. The lack of formal standards, however, cannot mean that the attorneys appearing before us do not have ethical obligations and duties. *See United States v. DeFalco*, 644 F.2d 132 (3d Cir. 1979) (en banc) (duty of professional conduct required before the court of appeals). Also, while the exact contours of that duty have not been stated, the vast majority of the courts in this country have adopted, with slight variation, the Code of Professional Responsibility promulgated by the American Bar Association, and thus, the basic principles of an attorney's duties and responsibilities are clear and easily applied. Further, since each of the attorneys in C&B are bound by the duties imposed by the bars of their respective states, they have notice of the common principles against conflicts of interests imbedded in the national standards of current practice.

We believe that the appropriate guidance for finding the current national standards of ethical norms lies in the standards promulgated by the American Bar Association. *Cf. Strickland v. Washington*, —— U.S. ——, 104 S. Ct. 2052, 2065 (1984) (looking to ABA standards in determining prevailing norms of practice for sixth amendment claim). Accordingly, we will apply the principles and rules set forth in the ABA Model Code of Professional Responsibility, and in the recently approved Model Rules of Professional Conduct.

B. STANDING

The movants, purporting to speak for the plaintiff class, claim that C&B breached its duty of professional responsibility by taking a position on appeal for Pan-O-Gold adverse to that of Land O'Lakes in litigation in which C&B had previously represented both parties.

C&B contends that the plaintiff class, as an entity, lacks standing to challenge the alleged breach of duty to Land O'Lakes. They argue that the correlative right to C&B's duty belongs only to the former client, Land O'Lakes. *See In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 88-89 (5th Cir. 1976) (requiring disqualification motion to come from former client). *But see Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984) (disqualification motion may be made by any opposing attorney under his duty to report disciplinary violations). Assuming without deciding that a motion to disqualify must be brought by a former client, we believe that the requirement is satisfied because the present record discloses that Land O'Lakes, through their current attorneys, joined this motion to disqualify C&B. We, therefore, consider this motion as brought by Land O'Lakes.

Further, because there is a conflict between the positions of two clients who had individually and privately retained C&B, we may consider this case solely in the context of a conflict of interest between the attorney and those clients. We consider this to be a case where two clients retained the same law firm to file suit, and where, later, that law firm chose to represent one of those clients against the other in the course of the same litigation. In view of our evaluation of the situation, we emphasize that it is unnecessary to address the considerable ethical problems that might arise between an attorney named by the court to represent the class and members of the class, or the general problems that might arise when some members of a class favor a settlement and others do not. *Cf. Developments, Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1247, 1447-57 (1981) (discussing theories of representation by class action attorneys).

C. THE DUTIES OWED BY C&B

C&B was retained by Land O'Lakes in this litigation and owed their client a duty of loyalty. In addition, the attorneys of C&B, as members of the bar, owe a general duty to maintain public confidence in the integrity of the bar. *In re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 530 (3d Cir. 1982). Under the ABA Code, these standards are reflected in Canons 5 and 9.

C&B owed Land O'Lakes a duty of vigorous advocacy. C&B contends, however, that while it may have owed Land O'Lakes that duty, it no longer owes them a duty of loyalty because C&B withdrew as counsel for Land O'Lakes. The duty of loyalty does not always detach when the representation ends. A client has an expectation that the attorney will diligently pursue his goals until the matter is completely resolved, absent an effective waiver. In litigation, an attorney may not abandon his client and take an adverse position in the same case. This is not merely a matter of revealing or using the client's confidences and secrets, but of a duty of continuing loyalty to the client.

Under the ABA Code, there was no express prohibition against representation of interests adverse to former clients, although this court has used Canon 9, "the appearance of impropriety," to imply such a duty. *See e.g., Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385-86 (3d Cir. 1972), *cert. den.*, 411 U.S. 986 (1973). Under the ABA Model Rules, this duty is clearly stated in Rule 1.9:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

ABA Model Rules of Professional Conduct, Rule 1.9. A rule against representation of interests adverse to a former client in the same or substantially related litigation has several purposes. It is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second, the rule is important for the maintenance of public confidence in the integrity of the bar. *See Richardson, supra.* Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.

We recognize that in some cases there may be relevant countervailing considerations. This court has often employed a balancing test in determining the appropriateness of the disqualification of an attorney. *See e.g. United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980). In determining the relevant considerations, we once again note that in this appeal C&B does not purport to represent the class. Therefore, a disqualification of C&B for this appeal would not require evaluation of the prejudice to the class. With respect to Pan-O-Gold and Land O'Lakes, C&B represented both of these clients for several years in this complex antitrust litigation. Balanced against Land O'Lakes' interests in the loyalty of its attorney are the interests of Pan-O-Gold in retaining its chosen counsel who has extensive familiarity with the factual and legal issues involved, and in avoiding the time and expense required to adequately familiarize a new attorney with the matter.

While disqualification would serve to increase the costs of litigation for Pan-O-Gold, it would be unfair, appearances apart, to permit C&B to use against its former client the information about the strengths and weaknesses of the case gained from the joint representation. Under these circumstances, C&B must be disqualified.

D. CONSENT BY THE FORMER CLIENT

C&B contends that it is still proper for it to represent Pan-O-Gold because Land O'Lakes consented to the continued representation by C&B. However, the burden of showing consent is on C&B, *IBM v. Levin*, 579 F.2d 271, 282 (3d Cir. 1978), and there is no indication in any of the papers or affidavits submitted that Land O'Lakes consented to C&B's continued representation of Pan-O-Gold during this appeal.[4] Further we note that this disqualification motion was brought, *inter alia*, by Land O'Lakes' attorney and we must infer that Land O'Lakes wishes C&B to be disqualified. Because we do not find consent, we do not reach the issue of whether there may be some circumstances where even the consent by the former client will not immunize an attorney against a disqualification based upon the appearance of impropriety and the maintenance of the integrity of the bar. *See ABA/BNA Lawyers' Manual on Professional Conduct* 51:207 (1984).

IV.

The motion to disqualify Cochrane & Bresnahan as counsel to Pan-O-Gold before this court will be granted.

ADAMS, J., concurring.

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[4] Cochrane stated at oral argument that Land O'Lakes gave its consent to C&B's continued representation of Pan-O-Gold. However, he made no representations to that effect in his affidavit or reply to the motion. Neither can we find any indication of consent in the district court record. Under these circumstances, we do not believe a question of fact has been raised.

I.

I agree with the result reached in this case, as well as with the majority's exposition of the principles which generally govern conflicts of interest in the traditional lawyer-client setting. I write separately to caution that those general principles must be applied in a carefully considered fashion to contexts other than those in which they arose.

Perhaps no area of the law provokes as much litigation concerning ethical issues as class actions. *See* Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct*, 27 Loy. L. Rev. 1047, 1047 (1981). Moreover, the Code of Professional Responsibility, Model Rules of Professional Conduct, as well as bar association opinions provide little guidance to the class action practitioner. *See id.* at 1048-49; *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1247, 1448 (1981). Courts confronting an ethical problem in the class action setting must focus on two points. First, courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context; and second, a resolution of such issues would appear to call for a balancing process that in most cases should be undertaken initially by the district court.

II.

The general rules described by the majority regarding the duties of loyalty and confidentiality were developed for and arose out of the traditional lawyer-client ambience in which the roles of the attorney and the client are well defined. The Code of Professional Responsibility, for example, envisions the attorney primarily as an advocate of the interests of one client. In such a setting it is usually possible to foresee the exact nature of any conflict of interest problem that might

arise out of multiple or successive representations. Generally, a lawyer can, with little adverse impact on a prospective client, guard against such situations by declining a representation.

Courts and commentators have noted that this traditional model cannot be carried over unmodified to the class action arena, since no clear allocation of decisionmaking responsibility has emerged between the attorney and class members. *See Pettaway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, at 1578 (1976). The obligation of counsel representing a class runs to the class as a whole, although as a general matter class counsel may have worked closely only with the named parties. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973); Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1203 (1981); *Conflicts of Interest*, 94 Harv. L. Rev. at 1451. Having all been affected similarly, class members generally know the initial objective of the class suit and accept the broad goals of the action. Despite the fact that class members are in some sense similarly situated, however, conflicting interests among the many individuals represented by a single attorney in a class action are frequently inevitable at some point during the litigation. *Conflicts of Interest*, 94 Harv. L. Rev. at 1447; *Class Actions*, 89 Harv. L. Rev. at 1594. "Representative suits carry with them an accepted structural risk that conflicts may arise between groups of class members." *Mendoza v. United States*, 623 F.2d 1338, 1344 (9th Cir. 1980), *cert. denied sub nom, Sanchez v. Tucson Unified School Dist. No. 1*, 450 U.S. 912 (1981).

This conflict most often, but not always, occurs over questions of relief. *See* J. Chambers, *Class Action Litigation: Representing Divergent Interests of Class Members*, 4 U. Dayton

L. Rev. 353, 356 (1979). For example, the case at hand involves objections to a proposed settlement, a rather common occurrence in that class actions many times are settled prior to or shortly after class certification. *See Class Actions*, 89 Harv. L. Rev. at 1536. When absent class members disagree with named plaintiffs regarding the adequacy of a settlement, class counsel will more often than not side with named parties. *Id.* at 1593. Absent class members who challenge a settlement thus may encounter as an adversary the class counsel, who represented them and arguably owes them a continuing duty of loyalty. Yet many commentators have noted that class counsel regularly defend the settlement against objectors, and even file appeals from district courts' disapprovals of settlements. *E.g.*, 2 H. Newberg, *Newberg on Class Actions* § 2710 (1977). Others have argued that the attorney "ought to have the opportunity to represent the position of that side of the split class which he or she supports." Chambers, 4 U. of Dayton L. Rev. at 357.

Under a strict application of the ethical rules, however, whenever class members disagree about the propriety of a settlement, an attorney representing discordant class members would be required to withdraw completely from the litigation. In such a case, an attorney's withdrawal would seemingly be automatic, regardless of which side the attorney agrees with. *See also* Waid, 27 Loy. L. Rev. at 1062; *Class Actions*, 89 Harv. L. Rev. at 1593 (both reading Code same way). Although this may promote the salutary ends of confidentiality and loyalty, it would undoubtedly have a serious adverse effect on class actions. Treating the relations between counsel and named and absent class members as identical to an attorney's relationship with individual clients outside the class action context would

lead courts to find a conflict of interest in many class actions and to call for the typical remedial responses, such as disqualification.

Class action litigation frequently promotes and protects the legal interests of those whose rights might not be protected at all without the class action device. Any approach resembling a per se disqualification of an attorney who represents multiple parties in a class, or the entire class, when any member disagrees, might well undermine the attractiveness and utility of the class action device by discouraging multiple representation.

If a class attorney is automatically prevented from continuing to represent the named parties or a majority of a class which supports a settlement, the minority dissenting class members are granted considerable leverage in the litigation by being able to force the majority to seek new counsel. Similar problems arise if counsel is not permitted to side with the objectors. In many types of class actions, when notice of settlement is given to the class, no single individual may have a sufficient stake in the outcome of the litigation to warrant the expense of organizing opposition to the proposed settlement and obtaining separate representation. Rhode, 34 Stan. L. Rev. at 1215. In less celebrated cases and in those in which the availability of a statutory attorney's fee is uncertain, it often will not be possible for dissenters to attract qualified counsel. *See generally* Handler, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A.J. 1388 (1975). Thus, a rule requiring automatic disqualification may well penalize dissent, and thereby deprive the court of the important assistance which objecting class members render by challenging the fairness of a class action settlement. *Class Actions*, 89 Harv. L. Rev. at 1566-67.

III.

As section C of the majority opinion suggests, the appropriate process would appear to be one of balancing. The costs to litigants and the class action device should be weighed carefully against the need to enforce the lawyer's duties of loyalty and confidentiality. The duty of loyalty to a client has been embodied in the Code through a prohibition of *any* appearance of impropriety. "Public confidence in the integrity of legal institutions serves as an over-arching consideration beneath which attorneys practice their profession. The semblance of unethical behavior by practitioners may well be as damaging to the public image as improper conduct itself." *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F.2d 751, 759 (2d Cir. 1975) (Adams, J., concurring).

Yet the duty owed in a class action is in some ways unique and cannot be equated with that in the traditional lawyer-client setting. The inherent risks in a class action are "accepted structural" facts, known to those who choose to participate in a class. Moreover, the legal system has responded to this risk with an array of carefully calibrated safeguards. *See generally* Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) (distinguishing class action "structural reform" litigation from traditional "dispute resolution" model). Courts have affirmed the special responsibility placed upon the trial judge to protect the rights of class members. *Mendoza*, 623 F.2d at 1344; *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). In addition, the Federal Rules of Civil Procedure impose strict procedural requirements on the conduct of class actions. *See* Fed. R. Civ. P. 23. Of special significance is the trial court's role in the supervision and approval of class settlements, based on the criterion of fairness. The attorney's duty to the class

requires him or her to make known to the court any conflicts in order that the court may take appropriate steps to protect the interests of all class members. *Pettaway*, 576 F.2d at 1176.

Taken together these realities of class action practice suggest that the mere appearance of impropriety when a lawyer attacks or defends a class settlement against the interest of a formerly represented class member may well be insufficient in itself to be the basis for an *automatic* disqualification.[1]

Similarly, although the importance of maintaining client confidences cannot be minimized, a rigid "prophylactic rule" in the area of client confidentiality in class actions would appear to be inappropriate. *Cf.* Note, *The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation*, 97 Harv. L. Rev. 947 (1984) (confidentiality should give way when it impedes basic representational aspects of a class action). Instead in a class action context in which disqualification potentially threatens the viability of the representational suit, the court should require some showing by the party urging disqualification. Relevant considerations include the amount and nature of the information that has been proffered to the attorney, its availability elsewhere, its importance to the question at issue, such as settlement, as well as actual prejudice that may flow from that information. *Cf. Silver Chrysler*, 518 F.2d at 759 (Adams, J., concurring) (suggesting, because of countervailing factors, a showing of actual knowledge of confidential and *pertinent*

---

[1] Moreover, although considerable knowledge and experience might have been gained by the attorney in the early stages of a case, such information need not in and of itself jeopardize or unfairly unbalance the case of the class members the attorney does not side with. The opposing clients as members of the original suit might well enjoy the advantage of having gained important information with which to wage their opposition. Chambers, 4 U. of Dayton L. Rev. at 357.

information).[2] In camera review of the information might be in order in some cases to safeguard the class members from the harm caused by disclosure in open court. *See* Note, 97 Harv. L. Rev. at 960. These factors should then be balanced against the costs to the opposing party, and the possibility of securing new counsel. Such costs will likely be affected by the point in the litigation at which the conflict develops; the burden is perhaps less at earlier stages.

IV.

The disqualification motion at issue in the present appeal was first raised before this Court. As the majority notes, this motion is properly before us; a federal court has inherent powers over the discipline of attorneys practicing before it. In an appropriate case, of course, the appellate court may resolve such an issue in the first instance. In some proceedings, the foregoing analysis would suggest a remand to the district court, which is in a more advantageous position to balance the factors involved than is an appellate court lacking factfinding resources. Alternatively, the appellate court might appoint a special master.

Nevertheless, I cannot say that the motion to disqualify the firm of Cochrane and Bresnahan has been improvidently granted. Sufficient evidence is extant in the present record

---

[2] In the criminal context society arguably has a greater interest in preventing conflicts of interest; furthermore, the right to effective assistance of counsel is guaranteed by the Sixth Amendment. The Supreme Court has held that a defendant who objects before trial to multiple representation by counsel must show that the potential conflicts impermissibly imperil his right to a fair trial. Cuyler v. Sullivan, 446 U.S. 335, 348 (1979). A defendant who raises no objection at trial must demonstrate that a conflict of interest actually affected the adequacy of representation, although the Court does not require any indulgence of "nice calculations as to the amount of prejudice" attributable to the conflict. *Id.* at 349; Glaser v. United States, 315 U.S. 60, 76 (1942).

to permit a proper balancing process as outlined above. Some of the important factors weighing towards disqualification are that the firm represented only three class members, not the entire class or a large portion of it; that a large amount is at stake for each litigant; and that the party potentially forced to proceed without chosen counsel is a large corporation with ample resources to enable it to secure new counsel.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5729

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION
(MDL 414)
John E. Koerner & Co., Inc.,
Imperial Products Corporation, and
Pan-O-Gold, Inc.,

Appellants.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Misc. No. 80-0059)

SUE PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges* and LATCHUM, *District Judge.**

The petition for rehearing filed by appellants, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

* The Honorable James L. Latchum, United States Senior District Judge for the District of Delaware, sitting by designation.

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

SEITZ

Circuit Judge

DATED: January 7, 1985

APPENDIX C

F.R.A.P. Rule 46(c) and Rule 1.9 of ABA Rules of Professional Conduct

Rule 46(c) Federal Rules of Appellate Procedure.

(c) Disciplinary power of the Court over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested to take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Rule 1.9 of ABA Rules of Professional Conduct

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

APPENDIX D

Correspondence between law firms DOHERTY, RUMBLE & BUTLER and COCHRANE & BRESNAHAN concerning fees and duties in the Corn Derivatives Antitrust Litigation.

DOHERTY, RUMBLE & BUTLER
Attorneys at Law
1500 First National Bank Building
Saint Paul, Minnesota 55101

February 1, 1980

Mr. Richard H. Magnuson
Vice President and General Counsel
Land O'Lakes, Inc.
614 McKinley Place
Minneapolis, Minnesota 55413

Re: CORN DERIVATIVES CLASS ACTION LITIGATION

Dear Mr. Magnuson:

This letter is to confirm our understanding that Land O'Lakes, Inc. has retained the firms of Doherty, Rumble & Butler and Cochrane & Bresnahan to institute a class action antitrust complaint in the so called corn starch derivatives antitrust litigation. It is agreed that the firms will be paid a contingent fee in the amount of ten percent of the net amount of recovery irrespective of class fees. In addition Land O'Lakes agrees to pay its proportionate share of out-of-pocket expenses.

Enclosed is a copy of the Complaint that we have prepared and that is in the process of being served.

We appreciate this opportunity to once again be of service to you.

Very truly yours,
DOHERTY, RUMBLE &
BUTLER
By: EUGENE M. WARLICH

EMW/sy
Enc.
cc. Mr. John A. Cochrane
Cochrane & Bresnahan

DOHERTY, RUMBLE & BUTLER
Attorneys at Law
1500 First National Bank Building
Saint Paul, Minnesota 55413

February 1, 1980

Mr. John A. Cochrane
Cochrane & Bresnahan
Attorneys at Law
500 Cochrane & Bresnahan Building
360 Wabasha Street
St. Paul, Minnesota 55102

Re: CORN STARCH DERIVATIVE
ANTITRUST LITIGATION

Dear John,

Enclosed is a copy of my letter to Dick.

This is to confirm our understanding reached today that the ten percent contingent fee referred to in the enclosed letter will be divided two-thirds to Doherty, Rumble & Butler and one-third to Cochrane & Bresnahan. In addition, each firm will be entitled to its total class fee awarded by the court.

It will be a great pleasure to work with you once more.

Yours very truly,
DOHERTY, RUMBLE &
BUTLER
By: GENE

EMW/sy
Enc.

COCHRANE & BRESNAHAN
360 Wabasha Street
Suite 500
St. Paul, MN 55413

February 5, 1980

DOHERTY, RUMBLE & BUTLER
1500 First National Bank Building
Saint Paul, Minnesota 55101
ATTENTION: Eugene M. Warlich

Re: CORN DERIVATIVE ANTITRUST
LITIGATION, MDL 414

Dear Gene:

Thank you for your letter of February 1, 1980. In following with our understanding, your firm will handle all of Land O'Lakes Interrogatories, document discovery matters, etc. and our firm will handle court appearances and court related matters regarding this litigation.

Very truly yours,
JOHN A. COCHRANE

JAC:sdt

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No.

COCHRANE & BRESNAHAN
PAN O'GOLD, INC., IMPERIAL PRODUCTS CORP.,
AND JOHN E. KOERNER & CO., INC.

Petitioners,

v.

PLAINTIFF CLASS REPRESENTATIVES AND
THE PLAINTIFF CLASS

Respondents,

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION
(MDL 414)

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 1985, one copy of the Petition for Writ of Certiorari has been sent by U.S. Mail, First Class, and properly addressed to the following:

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(8)

No. 84-1413

Office - Supreme Court, U.S.
FILED
MAY 15 1985
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

COCHRANE & BRESNAHAN,
PAN O'GOLD, INC., IMPERIAL PRODUCTS CORP.,
AND JOHN E. KOERNER & CO., INC.,
Petitioners

v.

PLAINTIFF CLASS REPRESENTATIVES,
Respondents

In Re: Corn Derivatives Antitrust Litigation
MDL 414

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

The Petition has been filed on behalf of three plaintiffs in the District Court, and on behalf of a law firm which represented two of those plaintiffs and a class member in the District Court. The underlying litigation is an antitrust class action which was settled in 1983. Those settlements were approved, after briefing and hearing, by the District Court.

In the District Court, the Petitioner law firm represented one plaintiff who supported and accepted the proposed settlement, while simultaneously representing another plaintiff who actively opposed the same settlement. The undersigned Respondents, asserting that this dual position presented a manifest conflict of interest, moved in the Third Circuit to disqualify Petitioners. The Court of Appeals for the Third Circuit granted the Motion to Disqualify, ruling that it would be unfair to permit one of Petitioner law firm's clients to use against another client, information which had been gained during the joint representation.

The question presented for review is as follows:

Did the Court of Appeals in the *Corn Derivatives Antitrust Litigation* act within its broad appellate authority in concluding that Petitioner law firm should be disqualified, where two clients retained Petitioner law firm to file suit, and where, later, that law firm chose to represent one of those clients against the other in the course of the same litigation.

STATEMENT REQUIRED BY RULE 28.1

Respondents are class representatives of the plaintiff class, a class of purchasers of corn derivatives products, and include the following class representatives:

Bear Stewart & Corp.
Bodines, Inc.
Cumberland Farms Dairy, Inc., whose parent is Delaware Food Stores, Inc.
Consolidated Packaging Corp.
Eastern Candy Company, Inc.
Food Foundation, Inc.
Golden Quality Ice Cream Company
G. Heileman Brewing Company, Inc.
Health Care Industries, Inc.
Kalva Corp.
Korbro Oil Corp.
Land O'Lakes, Inc., whose partially owned subsidiaries are Norris Creameries, Inc.; Imperial Packaging, Inc.; Imperial, Inc.; and Lakeside Dairy Company
Plantation Confection Company, Inc.
Virnelson Bakery, Inc.

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No. 84-1413

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COCHRANE & BRESNAHAN,
PAN O'GOLD, INC., IMPERIAL PRODUCTS CORP.,
AND JOHN E. KOERNER & CO., INC.,
Petitioners

v.

PLAINTIFF CLASS REPRESENTATIVES,
Respondents

In Re: Corn Derivatives Antitrust Litigation
MDL 414

BRIEF IN OPPOSITION OF RESPONDENTS

Pursuant to Rule 27.2(b) of the rules of this Court, RESPONDENTS, plaintiff class representatives in the Court below, file this brief in opposition to the Petition for a Writ of Certiorari seeking to overturn a decision of the Court of Appeals for the Third Circuit disqualifying the Petitioner law firm, and respectfully request this Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petition has been filed on behalf of three plaintiffs in the District Court, and on behalf of a law firm which represented two of those plaintiffs and a class member in the District Court.

In the underlying proceeding, numerous cases, most of which were filed as class actions, were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the United States District Court in Newark, New Jersey. Each Complaint alleged violations by defendants of the antitrust laws. The actions were resolved by settlements, which settlements were approved by the District Court.

In April, 1983, Petitioner, Cochrane & Bresnahan, stated its opposition on behalf of its clients to the proposed settlements. According to Petitioner, Cochrane & Bresnahan, the firm learned on June 30, 1983, that one of the plaintiffs (Land O' Lakes), and a class member (General Mills), which the Petitioner firm represented, approved the settlements and wanted to participate in those settlements. But not until October, 1983, almost four months later, did Petitioner, Cochrane & Bresnahan, withdraw its representation of the plaintiff supporting the settlements. During this time, however, that firm actively opposed those settlements; settlements in which two of its clients, Land O' Lakes and General Mills, had already expressly stated their wish to participate.

The client supporting the settlement, Land O' Lakes, Inc., joined by other plaintiffs in the Court below, then moved to disqualify Cochrane & Bresnahan who was its counsel, because of the manifest conflict inherent in such joint representation by the Petitioner law firm.

Land O' Lakes, Inc. is also a Respondent in this Court, and is opposing the Petition for Certiorari.

On November 15, 1984, the Court of Appeals for the Third Circuit, granted the Motion to Disqualify the Petitioner law firm, holding that:

> ". . . it would be unfair, appearances apart, to permit [Cochrane & Bresnahan] to use against its former client the information about the strengths and weaknesses of the case gained from the joint representation. Under these circumstances, [Cochrane & Bresnahan] must be disqualified." Pet. App. A at 14a.

The plaintiff class is not now "unrepresented" as a result of the ruling of the Court of Appeals for the Third Circuit. At least twenty other class action complaints were consolidated by the Multidistrict Panel. Counsel in those actions continue to represent the class.

REASONS FOR DENYING THE WRIT

Nothing in the Petition supports the grant of a Writ of Certiorari, and none of the points raised by Petitioners is worthy of review.

First, the Petition raises no issue of public importance or of general application. In essence, as determined by the Court of Appeals for the Third Circuit, this is a simple case:

> ". . . where two clients retained the same law firm to file suit, and where, later, that law firm chose to represent one of those clients against the other in the course of the same litigation. In view of our evaluation of the situation, we emphasize that it is unnecessary to address the considerable ethical problems that might arise between an attorney named by the court to represent the class and members of the class, or the general problems that might arise when some members of a class favor a settlement and others do not." Pet. App. A at 11a.

Given the factual context of this matter, the Opinion of the Court of Appeals was confined to narrow issues on narrow facts.

Second, no conflict among the Circuits is presented by the Decision of the Court of Appeals, nor is any issue of broad national importance raised by the Petition.

I. The Petition Raises No Issues of Public Importance or of General Application.

Because Petitioners have raised no issue of public importance or general application, the Petition should be denied.

In essence, the Petition expresses the dissatisfaction of a law firm which, to paraphrase the description in the Opinion of the Court of Appeals, was retained by two clients to file suit, and then later chose to represent one client whose interests were in direct conflict with the other client, in the same litigation.

The Petitioners raise a clear question of dual representation which is not difficult to resolve. Simply stated, a law firm cannot simultaneously represent one client who accepts a proposed settlement, while representing another client who opposes the same settlement, and then correct the ill by belatedly withdrawing from one of the two representations, four months *after* objecting to the proposed settlements.

While Petitioners repeatedly state that the law firm's client was "uncomplaining", Petitioners fail to point out the critical fact that its other client moved to disqualify Petitioner from the litigation because of the Petitioner law firm's dual representation. On that Motion, which was joined by each of the plaintiff Respondents herein, the Court of Appeals for the Third Circuit exercised its inherent supervisory powers and determined that the Petitioner law firm, Cochrane & Bresnahan, should be disqualified. See *Matter of Abrams*, 521 F.2d 1094, 1099 (3d Cir.), *cert denied*, 423 U.S. 1038 (1975).

Not only is there an apparent actual conflict, but there is a serious appearance of impropriety in representing clients with adverse interests. *In re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 530 (3d Cir. 1982). See also, *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert denied*, 429 U.S. 830 (1976); *ABA MODEL RULES OF PROFESSIONAL CONDUCT*, Rule 1.9.

Such a manifest conflict of interest cannot be sanctioned by any Court for the sound reasons set forth in the Opinion of the Third Circuit.

Although Petitioners style the question presented as involving the right of a class representative to object to a settlement, Respondents respectfully submit that there is no such issue before this Court. As described by the Court of Appeals and as set forth above, this case involves a conflict caused by Petitioner law firm's representation at the outset of this litigation of two clients followed by a change of heart as to that representation after the clients adopted conflicting positions with respect to the settlements. There was no challenge raised in any Court below as to the right of a class member to object to a class settlement, nor was that the ground on which the Petitioner law firm's client sought to disqualify Petitioner. The issue before the Court of Appeals for the Third Circuit was simply the duty of individual loyalty counsel owes to a client, as well as the duty owed to the public to avoid even the appearance of impropriety to protect the integrity of our legal system. *In re Eastern Sugar Antitrust Litigation*, supra; *See also, I.B.M. v. Levin*, 579 F.2d 271 (3d Cir. 1978).

II. No Conflict Among The Circuits Is Presented By The Petition.

There is no conflict among the Circuits raised by Petitioners, and accordingly, there is no conflict presented for resolution by this Court. No matter how the issue is

restyled by Petitioners, the unadorned fact is that a law firm is not permitted to switch sides if the representations are substantially related, as they are here, and no Circuit has held to the contrary. See, e.g., *Analytical, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1268 (7th Cir. 1983).

The issues raised by the instant Petition are not related to those in *Richardson-Merrell, Inc. v. Anne Elizabeth Koller, et al.*, No. 84-127, which was argued this term before this Court. The *Richardson* Petition involved substantial questions of wide application, including appealability of disqualification orders under the collateral order exception to the final judgment rule, and a constitutional question as to whether the conduct of the attorneys was protected by the First Amendment. No such far-reaching procedural or constitutional issue is presented in the instant Petition.

CONCLUSION

Petitioners have failed to show any abuse of discretion by the Court of Appeals, or any conflict between the Circuits. Accordingly, for the reasons set forth above, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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